San Diego Law Review

Volume 13
Issue 2 *1976*

Article 6

3-1-1976

In Re Lisa R.? - Limiting the Scope of the Conclusive Presumption Doctrine

Nikki Westra

IN RE LISA R.—LIMITING THE SCOPE OF THE CONCLUSIVE PRESUMPTION DOCTRINE

INTRODUCTION

Patricia was found drunk in a gas-filled house with her four-year-old daughter, Lisa. The mother pleaded guilty to child neglect and was placed on probation. The county probation officer sought a dependency determination on the basis that Patricia was an unfit mother and endangered Lisa's safety.[1] On July 3, 1969, Lisa was made a dependent child of the juvenile court.[2] Lisa was eventually placed with foster parents who wished to adopt her. Patricia, however, refused to give her consent[3] despite her alcoholism, heroin addiction and obvious inability to properly care for the child. Her husband, Donald, had previously signed documents relinquishing Lisa for adoption but insisted on the inclusion of a caveat that such action "in no way admits that [he is] the father of this child."[4]

Indeed, Donald was not Lisa's father. In September of 1965, Patricia had left Donald and began living with a man named Victor. Eleven months later Lisa was born. Victor was designated as the father on the birth certificate. Five months after Lisa's birth, Patricia returned to her husband, and over Victor's objection, took Lisa with her.

---

1. *In re* Lisa R., 13 Cal. 3d 636, 640, 532 P.2d 123, 125, 119 Cal. Rptr. 475, 477 (1975).

2. Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court.
   (a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control. CAL. WELF. & INST'NS CODE § 600(a) (West 1972).

3. A child born before or during the marriage of its parents or within 300 days after the termination of such marriage by judicial decree cannot be adopted without the consent of its parents if living. CAL. CIV. CODE § 224 (West Supp. 1975).

4. *In re* Lisa R., 41 Cal. App. 3d 89, 92, 115 Cal. Rptr. 859, 862 (1974).

By the time of the annual dependency review[5] in 1973, Patricia and Donald were both dead from drug overdoses. Victor, as the putative father, appeared at the hearing for the purpose of gaining visitation rights and, eventually, custody of Lisa.[6] The juvenile court, in its rejection of Victor's offer of proof, asserted that he lacked standing to claim paternity.[7] At issue were two sections of the California Evidence Code. Under section 621[8] all children born to a wife cohabitating with a potent husband are deemed legitimate. This section creates a conclusive presumption which precludes all evidence rebutting the husband's paternity. Victor, as the putative father, was not hampered by this presumption, since Patricia was not living with Donald at the time of Lisa's birth.

Section 661,[9] however, is applicable in noncohabitation cases. Legitimacy is presumed when a child is born to a married woman or within 300 days after the dissolution of marriage. This presumption appears to be rebuttable; however, the statute permits only the husband, wife, a descendant of either, and the state[10] to rebut the legitimacy of the child. Victor was not one of those enu-

---

5. Under CAL. WELF. & INST'NS CODE § 729 (West 1972), an annual hearing is required to review the child's status and to determine if the dependency status of the minor should be continued. This was the fourth such review for Lisa.

6. Although appellant's long-range plan was to gain custody of Lisa, the only issue before the court was whether Victor could offer evidence to demonstrate that he was in fact the biological father. Fitness was not in issue.

7. The juvenile court also rejected the offer of proof on the grounds that it had no jurisdiction to decide the issue of paternity. The California Supreme Court, however, disagreed and held that

> a juvenile court is . . . vested with the authority to make such determinations which are incidentally necessary to the performance of those functions demanded of it by the Legislature pursuant to the Juvenile Court Law. *In re* Lisa R., 13 Cal. 3d 636, 643, 532 P.2d 123, 127, 119 Cal. Rptr. 475, 479 (1975).

8. Notwithstanding any other provision of law, the issue of a wife cohabitating with her husband, who is not impotent, is conclusively presumed to be legitimate. CAL. EVID. CODE § 621 (West 1966).

9. A child of a woman who is or who has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof. *Id.* § 661.

10. The state can only rebut this presumption in a criminal non-support action under CAL. PENAL CODE § 270 (West Supp. 1975):

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

merated; thus, the presumption was conclusive as to him and he was barred from rebutting the presumption of Lisa's legitimacy.[11]

In the unanimous decision of *In re Lisa R.*,[12] the California Supreme Court reversed, holding that "a presumption which precludes to appellant in the instant circumstances a right to offer evidence to prove that he is the father of the minor child is unreasonable, arbitrary and capricious, and a denial of due process."[13] In striking down the presumption, the California Supreme Court relied upon the United States Supreme Court's conclusive presumption doctrine.

To understand the significance of *In re Lisa R.*, it must be viewed against the background of this doctrine. This Comment will trace the development of the conclusive presumption doctrine, determine its relationship to traditional substantive and procedural due process analysis, and point out the inherent limitations of the doctrine which are recognized in *In re Lisa R.*

THE CONCLUSIVE PRESUMPTION DOCTRINE

Evolution of the Conclusive Presumption Doctrine

The conclusive presumption doctrine is a modern development.[14]

11. "Although it is called 'rebuttable,' as a practical matter the presumption of section 661 is conclusive upon parties other than those to whom it extends the right of dispute." *In re* Lisa R., 41 Cal. App. 3d 89, 93, 115 Cal. Rptr. 859, 862 (1974).

12. 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). For articles on the putative father aspect of this case, see Schwartz, *Rights of a Father With Regard to His Illegitimate Child*, 36 OHIO ST. L.J. 1 (1975); Note, *Rights of a Putative Father in Relation to His Illegitimate Child: A Question of Equal Protection*, 22 SYRACUSE L. REV. 770 (1971); Comment, *The Emerging Constitutional Protection of The Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972); Comment, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U.C. DAVIS L. REV. 1 (1973).

13. 13 Cal. 3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

14. In two cases in the early 1930's, the Court invalidated certain tax statutes which created conclusive presumptions. In Hoeper v. Tax Comm'n, 284 U.S. 206 (1931), the statute imposed a tax on the appellant which was based in part on the income of his wife. In Heiner v. Donnan, 285 U.S. 312 (1932), the statute created a conclusive presumption that gifts made within two years prior to death of the donor were made in contemplation of death and thus were required to be included in the decedent's estate and subject to taxation. The Court held that these conclusive presumptions operated arbitrarily and therefore took the property of the taxpayers without due process of law.

Stanley v. Illinois[15] was the first in a series of cases utilizing this mode of analysis. In Illinois, the statutory definition of "parent" did not include an unwed father.[16] Thus, under the state child dependency statute, when an unwed mother died, the state would assume custody of the children since no legal "parent" existed. Stanley, an unwed father, was denied a hearing on parental fitness after the mother of his children died. "Stanley's actual fitness as a father was irrelevant."[17] In effect, he was conclusively presumed unfit even though Illinois permitted "married fathers—whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children."[18] The United States Supreme Court held that Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.[19] The Court recognized that a fundamental interest—the maintenance of family relationships—was at stake and noted that "the Constitution recognizes higher values than speed and efficiency."[20] The conclusive presumption inherent in the statute violated Stanley's due process rights.

A year later, in *Vlandis v. Kline*,[21] the Court struck down Connecticut's statutory definition of nonresidents for purposes of tuition schedules within the state university system.[22] The statute embodied a

> conclusive and unchangeable presumption of nonresident status from the fact that, at the time of application for admission, the student, if married, was then living outside of Connecticut, or, if single, had lived outside the State at some point during the preceding year.[23]

The interests of the students claiming residency included the right to travel and the opportunity to obtain a higher education at an affordable cost. The corresponding state interest consisted only of administrative convenience. The Supreme Court agreed with appellees' claim that they had a constitutional right to rebut the presumption of nonresidence and cited *Stanley* as controlling. The Court agreed with Connecticut that a state could charge nonresidents more for tuition than bona fide residents; however, it also held that Connecticut had not afforded the students a fair oppor-

15. 405 U.S. 645 (1972).
16. *Id.* at 646.
17. *Id.* at 647.
18. *Id.*
19. *Id.* at 649.
20. *Id.* at 656.
21. 412 U.S. 441 (1973).
22. The appellees, classified as nonresidents, were forced to pay over four times the amount of tuition charged to resident students. *Id.* at 444.
23. *Id.* at 443.

tunity to establish their status as residents. Alternative means were found available to accomplish this factual determination. Therefore "[t]he State's interest in administrative ease and certainty [could not] . . . save the conclusive presumption from invalidity under the Due Process Clause . . . ."[24]

The Court articulated its test for determining the constitutionality of conclusive presumptions for the first time in *Vlandis*. If the presumed fact "is not necessarily or universally true in fact, and . . . the State has reasonable alternative means of making the crucial determination . . ."[25] the presumption cannot stand. The state must allow the individual the opportunity to prove that he or she does not fit into the presumed classification.

The latest decision in this line of authority, *Cleveland Board of Education v. La Fleur*,[26] involved challenges to school board regulations which prescribed mandatory leaves for pregnant schoolteachers. Inherent in the regulations was the conclusive presumption that such teachers were unfit to teach[27] because of their pregnancy, without any individualized determination of such unfitness. The teachers challenged the constitutionality of the regulations which operated to deprive them of their livelihood. The Court declared the regulations unconstitutional by virtue of the fact that they "seriously burden the exercise of a protected constitutional liberty."[28] This liberty was identified as the basic right to bear a child.[29] The Court further stated that the regulations penalized female teachers exercising this right by requiring an unpaid, forced leave of absence. The Court held that the regulations did not pass the *Vlandis* test of "necessarily or universally true in fact."[30]

24. *Id.* at 451.
25. *Id.* at 452.
26. 414 U.S. 632 (1974).
27. *Id.* at 644.
28. *Id.* at 651.
29. There is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
30. *See* Vlandis v. Kline, 412 U.S. 441, 452 (1973). The capacity of an expectant mother to continue work depends on the individual woman involved. The regulations did not take any personal differences into consideration. They presumed such teachers were incompetent "and that presumption applie[d] even when the medical evidence as to an individual woman's physical status might be wholly to the contrary." Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 644 (1974). In addition, the school boards had other reasonable means available to accomplish its goals of teaching

Thus, under the conclusive presumption doctrine, the United States Supreme Court has invalidated statutes and regulations which, in effect, create conclusive presumptions if the presumed fact is not necessarily or universally true.[31] The complainant is then granted a right to rebut the presumption. Although classified by the Court as a due process doctrine, the conclusive presumption doctrine does not fit neatly into either of the two traditional branches of analysis, substantive or procedural due process analysis.

The Conclusive Presumption Doctrine as a Product of the Interplay Between Substantive and Procedural Due Process

Substantive due process analysis was applied primarily during the early part of the twentieth century when the United States Supreme Court invalidated social and economic legislation.[32] Although the Court recognized that sovereign police power existed, substantive due process placed stringent restrictions on its use. The Court, in applying this mode of analysis,[33] would first focus on the supposed legislative *purpose* of the challenged statute to determine if it promoted the public health, safety, welfare or morals. The next step was to decide if the *means* were reasonable and appropriate to the stated ends; and under the guise of passing on the means' appropriateness, the Court often substituted its own public policy conceptions for those of the legislature. Finally, the *effects* were

---

continuity. The Court noted that the interest in continuity of teaching would be satisfied "if the teacher herself were allowed to choose the date so long as the decision were required to be made and notice given of it well in advance of the date selected." *Id.* at 642. Convenience alone was insufficient to justify infringement of the basic rights involved.

31. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

32. A major case utilizing this method of analysis was Lochner v. New York, 198 U.S. 45 (1905). The statute involved prohibited employment of persons in bakeries for more than 60 hours a week, or for more than 10 hours a day. The Court held it unconstitutional on the ground that it interfered with the right of contract between the employer and his employees. The statute's relation to the health and welfare of the employees was considered too remote to justify the infringement of such liberties.

33. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? . . . Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. . . . We think the limit of the police power has been reached and passed in this case. *Id.* at 56-58.

scrutinized to determine if the consequences of the statute's application were too drastic on individual liberty and property interests. The Court was not inclined to defer to legislative judgment, and many statutory enactments were invalidated as violative of substantive due process.[34] The Court soon abandoned the doctrine[35] and thereafter largely refrained from overstepping the domain of the police power and substituting its judgment for that of the legislature.[36]

The focus of due process analysis then shifted to the procedural area. The personal rights of "liberty, or property"[37] may not be deprived without procedural due process. In civil cases, the Court has expanded the notion of protected constitutional liberties and has held that notice and a hearing must be provided before these rights can be terminated.[38] These requirements vary with the circumstances of each case. In a series of criminal cases[39] the Court effected a revolution in the criminal law by vastly expanding the rights of the accused and setting out technical procedural guidelines which must be afforded the alleged offender.

34. This doctrine was utilized almost exclusively for the protection of individual economic rights and the freedom to contract. *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (statute restricting entry into ice manufacturing business); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (statute providing minimum wages for women); Adams v. Tanner, 244 U.S. 590 (1917) (statute prohibiting employment agencies from collecting fees from workers); Coppage v. Kansas, 236 U.S. 1 (1915) and Adair v. United States, 208 U.S. 161 (1908) (statutes prohibiting "yellow dog" contracts).

35. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), where the Court overruled prior decisions invalidating minimum wage laws as violative of due process.

36. The modern view of the Supreme Court regarding substantive due process is illustrated by Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), where the Court stated that it would leave debatable issues regarding social and economic legislation to the judgment of the legislature. *See also* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

37. U.S. CONST. amend. XIV, § 1.

38. Board of Regents v. Roth, 408 U.S. 564 (1972). *See also* Perry v. Sindermann, 408 U.S. 593 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

39. *See* Chimel v. California, 395 U.S. 752 (1969) (scope of search incident to a lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (regulations regarding stop and frisk searches); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel during custodial interrogation); Gideon v. Wainwright, 372 U.S. 335 (1962) (right to counsel in felony prosecutions); Mapp v. Ohio, 367 U.S. 643 (1961) (application of the exclusionary rule extended to state criminal proceedings).

The conclusive presumption doctrine is, in effect, a product of the interplay between the substantive and procedural aspects of due process.[40] In the substantive area, the doctrine rejects the conclusiveness of the presumption embodied in the statute if the presumed fact is not universally true.[41] Unlike the substantive due process method, however, the statute is not struck down completely when conclusive presumption analysis reveals a constitutional defect. If relief is mandated, the court then applies procedural due process remedies and allows evidence to be presented to rebut the presumption. The complainant is entitled to a hearing to determine the validity of the claim. The basis of the constitutional defect is substantive; the relief is procedural.

The Boundaries of the Conclusive Presumption Doctrine—The Evidentiary Spillover

Nature of Conclusive Evidentiary Presumptions

A presumption is an inference which the law requires the trier of fact to draw once certain basic facts are established.[42] If basic facts *A* and *B* are believed, then conclusion *C* must be presumed to be true. If the presumption is conclusive, no evidence, however convincing, will be admitted to refute *C*. Any dispute must be directed toward the basic or foundational facts themselves, *A* and *B*. Such evidentiary presumptions usually reflect external public policy[43] and their use promotes speed and efficiency in judicial actions

40. Although some commentators insist that the conclusive presumption doctrine is really a disguised equal protection analysis, it is readily distinguishable. The conclusive presumption doctrine differs from equal protection in that it does not strike down the classification itself but merely allows the objecting party to demonstrate on which side of the classification he belongs. Equal protection analysis would be weak in this area because "reasonableness" under the lax standard is easy to prove. On the other hand, the Court wishes to keep the number of "suspect" classes to a minimum to avoid the far-reaching effects of "strict scrutiny." *See, e.g.*, Simpson, *The Conclusive Presumption Cases: The Search for a New Equal Protection Continues*, 24 Cath. U.L. Rev. 217 (1975); Note, *The New Equal Protection—Substantive Due Process Resurrected Under a New Name?*, 3 Ford. Urban L.J. 311 (1975).

41. Where a statute presumes that "all *A* are *B*" and it is true in fact that "some *A* are not *B*," then proof of the exception must be allowed. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

42. Cal. Evid. Code § 600 (West 1966).

43. In *In re* Lisa R., the Court of Appeals noted that the social policy of preserving the legitimacy of children underlies sections 621 and 661 of the California Evidence Code. However, they also rejected the social policy as not applicable today.

> Historically, that policy gave protection against the obloquy of bastardy. Only vestigial barbarism stigmatizes illegitimacy; a civilized society does not view it as a sin or even a mild handicap. Deflated to size, the statutory policy should seek no more than any other

by eliminating the necessity of proving the obvious. However, very few propositions outside the realm of mathematics and the natural sciences are obvious in the sense that they are universally true. Human behavior and the result of this behavior rarely conforms to absolute rules. Nevertheless, this is immaterial to the mandatory application of the conclusive presumption. It is, in effect, a substantive rule of law,[44] and the presumed fact's existence or nonexistence is immaterial. If the proponent can prove *A* and *B*, the legal consequence follows even if the opponent could prove that *C* does not exist.

In the utilization of the conclusive presumption doctrine there are two major decisions the courts must make; (1) does the doctrine apply to conclusive evidentiary presumptions, and (2) does the doctrine apply to all conclusive presumptions irrespective of the significance of the interests they impinge upon?

Application of the Conclusive Presumption Doctrine to Conclusive Evidentiary Presumptions

The United States Supreme Court, in deciding *Stanley, Vlandis,* and *La Fleur*, analyzed the challenged statute or regulation by reformulating it as a conclusive presumption. The Court then determined whether the presumption passed the test[45] of "necessarily or universally true in fact" as articulated in *Vlandis.*[46] Although only substantive statutes have been invalidated by the Supreme Court up to this time, the opinions' language strongly suggests that the *Vlandis* test applies to conclusive evidentiary presumptions as well.

In *Stanley*, the Court framed the issue as whether "a presumption that distinguishes and burdens all unwed fathers [is] constitutionally repugnant . . . ."[47] It seems logical to assume that since the

presumption—to eliminate or limit the element of indeterminability. 41 Cal. App. 3d at 96, 115 Cal. Rptr. at 864.

44. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 804 (2d ed. 1972).

45. Although the test for determining the validity of conclusive presumptions was not clearly stated in *Stanley v. Illinois*, it was implied in language applying to the particular facts of the case.

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. 405 U.S. 645, 654 (1972).

46. 412 U.S. 441, 452 (1973).

47. 405 U.S. 645, 649 (1972).

Court added an extra step in the analysis to reword the statute as a conclusive presumption, it would likewise invalidate a conclusive evidentiary presumption that was not disguised as substantive law. While recognizing that "[p]rocedure by presumption is always cheaper and easier than individualized determination,"[48] the Court also asserted that "the Constitution recognizes higher values than speed and efficiency."[49] To the extent that conclusive evidentiary presumptions are designed to promote speed and eliminate conflicting results,[50] there seems no overriding reason why they should escape judicial scrutiny.

In *Vlandis*, the Court stated that

> [t]he State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised.[51]

It would be difficult to effectively argue that a challenger should not be provided a forum to present rebutting evidence since evidentiary presumptions apply during judicial hearings. It is also highly unlikely that any conclusive evidentiary presumption would be able to pass the exacting test of "necessarily or universally true in fact."[52]

Emphasis on the Importance of the Interests Involved

The question then arises as to the fate of all conclusive presumptions; both conclusive presumptions inherent in statutes and evidentiary conclusive presumptions. The language used by the Supreme Court definitely suggests disfavor with the process of presuming rather than proving. Followed to its logical extreme, the doctrine could invalidate all conclusive presumptions and convert them into rebuttable presumptions.

While the invalidation of all conclusive presumptions might at first seem an unlikely development, critics of the conclusive presumption doctrine have predicted that this analysis will have even more revolutionary consequences. Chief Justice Burger in his dissent in *Vlandis* voiced the fear that since "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might

48. *Id.* at 656-57.
49. *Id.* at 656.
50. "[T]he statutory policy should seek no more than any other presumption—to eliminate or limit the element of indeterminability." *In re* Lisa R., 41 Cal. App. 3d 89, 96, 115 Cal. Rptr. 859, 864 (1974).
51. 412 U.S. 441, 451 (1973).
52. *Id.* at 452.

be improved upon by individualized determinations,"[53] the majority's methodology poses a serious threat to the legal system itself. Although agreeing that the purposes of the majority were laudable, Justice Burger warned that

> the urge to cure every disadvantage human beings can experience exerts an inexorable pressure to expand judicial doctrine. But that urge should not move the Court to erect standards that are unrealistic and indeed unexplained for evaluating the constitutionality of state statutes.[54]

Justice Rehnquist's dissent in *La Fleur*[55] traced the development of law from a primitive system of ad hoc determinations of controversies to the modern development of general laws, labelling it "a significant step forward in the achievement of a civilized political society."[56] The Court's position, Rehnquist reasoned, represented an attack on such progress and an attempt to return to individualized, case-by-case decision making. It "is in the last analysis nothing less than an attack upon the very notion of lawmaking itself."[57]

Seizing upon the strong language used by Justices Burger and Rehnquist, many commentators[58] have echoed the dissenters' premonitions of impending doom to our system of lawmaking. They fear that the adoption of the conclusive presumption doctrine will lead to a wholesale invalidation of existing statutes. "Allowing

53. *Id.* at 462.
54. *Id.* at 463.
55. 414 U.S. 632, 657 (1974). Chief Justice Burger joined with Justice Rehnquist in dissent.
56. *Id.* at 658.
57. *Id.* at 660.
58. *See* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Sewell, *Conclusive Presumptions And/Or Substantive Due Process of Law*, 27 OKLA. L. REV. 151 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Comment, *Constitutional Law: The Irrebuttable Presumption—An Alternative to Equal Protection*, 14 WASH. L.J. 141 (1974). For other articles on the conclusive presumption doctrine, *see* Simpson, *The Conclusive Presumption Cases: The Search For a New Equal Protection Continues*, 24 CATH. U.L. REV. 217 (1975); Note, *The New Equal Protection—Substantive Due Process Resurrected Under a New Name?*, 3 FORD. URBAN L.J. 311 (1975); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Comment, *The Right to Rebut: Conclusive Presumptions in Civil Cases*, 6 CONN. L. REV. 725 (1974); Comment, *Irrebuttable Presumptions As An Alternative to Strict Scrutiny: From Rodriguez to La Fleur*, 62 GEO. L.J. 1173 (1974).

an individualized determination for every individual affected by legislatively created conclusive presumptions, seems an administrative impossibility."[59]

It is true that nearly every statute can be reformulated as a conclusive presumption and that nearly every such presumption is at least partly inaccurate. However, this does not mean that the conclusive presumption doctrine will be applied to every statute. Although the Court has not yet given any clear guidance as to the doctrine's scope, it is anomalous to assume that the Court intends to create a state of anarchy by invalidating all legislative enactments and conclusive evidentiary presumptions. It is highly unlikely that the predicted revolution will come to pass. The legal system can survive the advent of the conclusive presumption doctrine if the Court constructs adequate boundaries and limitations on the doctrine's scope.

In Re Lisa R.—An Attempt to Define the Boundaries of the Doctrine

In *In re Lisa R.*,[60] the California Supreme Court recognized the conclusive presumption doctrine's applicability to evidentiary presumptions but suggested a manageable limitation on the scope of the doctrine. The California court noted that the United States Supreme Court in *Stanley*

> premised its holding on "rights to conceive and to raise one's children" and held that such rights could not be taken from a father of a child born to a woman to whom he was not wed by operation of a statutory presumption of the father's unfitness.[61]

The court also noted that the right to raise one's children is an essential[62] and basic[63] civil right which is far more precious than property rights.[64] Thus Victor's interest in Lisa "is not only cognizable but also of sufficient substance to warrant deference"[65] unless due process requirements are fulfilled. The court concluded that a conclusive evidentiary presumption which denied a putative father the right to prove parentage did not meet due process requirements in that it was unreasonable, arbitrary and capricious.[66]

The California Supreme Court's reference to *Stanley* and the

59. Note, *Constitutional Law: The Irrebuttable Presumption Doctrine—An Alternative to Equal Protection*, 14 Washburn L.J. 141, 144 (1975).
60. 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).
61. *Id.* at 648, 532 P.2d at 130-31, 119 Cal. Rptr. at 482-83.
62. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
63. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
64. May v. Anderson, 345 U.S. 528, 533 (1953).
65. *In re* Lisa R., 13 Cal. 3d 636, 648, 532 P.2d 123, 131, 119 Cal. Rptr. 475, 483 (1975).
66. *Id.* at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

acknowledgment of the fundamental interests[67] involved in both cases, suggest the recognition of a limitation on the scope of the conclusive presumption doctrine. The court in *In re Lisa R.* indicated that for the doctrine to apply, there must be individual fundamental interests at stake. Admittedly the California Supreme Court cannot authoritatively limit the United States Supreme Court's doctrine. This limitation, however, is consistent with both the language and the results in *Stanley*,[68] *Vlandis*,[69] and *La Fleur*.[70]

The result of the imposition of this limitation on the conclusive presumption doctrine will be a dual standard for testing the constitutionality of conclusive presumptions, similar to the dual standard applied in the equal protection area.[71] The strict standard, "necessarily or universally true in fact,"[72] will be applied only when

67. The term "fundamental interest" is not synonymous with the term "fundamental right" used in the equal protection area. The "fundamental interests" of the conclusive presumption doctrine encompass a broader range of personal interests.

68. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 U.S. 645, 651 (1972). "[A]t the least, Stanley's interest in retaining custody of his children is cognizable and substantial." *Id.* at 652. When

> the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. *Id.* at 657.

69. The same considerations [as in *Stanley v. Illinois*] obtain here. . . . [U]nder the State's statutory scheme, neither [of the appellees] was permitted any opportunity to demonstrate the bona fides of her Connecticut residency for tuition purposes, and neither will ever have such an opportunity in the future so long as she remains a student. 412 U.S. 441, 448 (1973).

70. "By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." 414 U.S. 632, 640 (1974). "[W]e hold that the mandatory termination provisions . . . violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty." *Id.* at 651.

71. When a classification affects only nonspecific constitutional rights, the basis of the classification and its relationship to a permissible governmental purpose need only be reasonable. However, if the classification is grounded on "suspect" criteria or impinges on fundamental rights, it must be justified by a compelling state interest. *See* Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973).

72. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

fundamental rights or "basic constitutional libert[ies]"[73] are infringed by the application of the conclusive presumption. On the other hand, the "necessarily or universally true in fact"[74] standard will not be utilized when reviewing the constitutionality of most statutes and conclusive evidentiary presumptions which affect nonfundamental interests. In those instances, the state's interests in speed and efficiency will outweigh the individual's interest to have an opportunity to rebut the presumption.

Conclusion

Thus, the "necessarily or universally true in fact"[75] test will not be applied to all statutes and conclusive evidentiary presumptions. The court will selectively review the challenges to conclusive presumptions and limit the application of the doctrine to those instances where fundamental interests are abridged. By limiting the conclusive presumption doctrine in this manner, the fears expressed by the dissenters and commentators will not become reality. The feared attack on lawmaking will not materialize.

Nikki Westra

73. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 647 (1974).
74. Vlandis v. Kline, 412 U.S. 441, 452 (1973).
75. *Id.*

As this article was going to press, the United States Supreme Court decided two additional cases utilizing the conclusive presumption doctrine. Weinberger v. Salfi, 422 U.S. 749 (1975), exemplifies the limitation on the doctrine's scope. A provision of the Social Security Act excludes surviving wives and stepchildren who have familial relationships with a deceased wage-earner for less than nine months prior to his death. The Court upheld these duration-of-relationship requirements because they "lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death." *Id.* at 780. Although the statute sets up a conclusive presumption that the six-month marriage in question was a sham, the Court distinguished *Stanley, Vlandis,* and *La Fleur* on the basis that a "noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." *Id.* at 772. It is further noted that "[u]nlike . . . the custody proceedings at issue in *Stanley v. Illinois,* such programs do not involve affirmative Government action which seriously curtails important liberties cognizable under the Constitution." *Id.* at 785.

In a more recent case, Turner v. Department of Employment Security, 96 S. Ct. 249 (1975), the Court followed its decision in *La Fleur* and invalidated a Utah law which makes pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before childbirth until six weeks after childbirth. The Court noted that this conclusive presumption of incapacity and unavailability for employment infringed the petitioner's basic right to choose to bear a child. Since a substantial number of pregnant women are not in fact incapacitated for this 18-week period, the Court held the conclusive presumption invalid under the principles enunciated in *La Fleur.*

Thus, the United States Supreme Court seems to be recognizing the workable limitation on the scope of the conclusive presumption doctrine.